IN THE

Supreme Court of the United States

October Term, 1966

No. 249

WYATT TEE WALKER, MARTIN LUTHER KING, JR., RALPH ABERNATHY, A. D. KING, J. W. HAYES, T. L. FISHER, F. L. SHUTTLESWORTH and J. T. PORTER,

Petitioners,

v.

CITY OF BIRMINGHAM, a Municipal Corporation of the State of Alabama.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN C. AMAKER
LEROY D. CLARK
CHARLES STEPHEN RALSTON
MICHAEL HENRY
10 Columbus Circle
New York, New York 10019

ARTHUR D. SHORES
1527 Fifth Avenue North
Birmingham, Alabama

ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue North
Birmingham, Alabama

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.

Attorneys for Petitioners

HARRY H. WACHTEL
BENJAMIN SPIEGEL
598 Madison Avenue
New York, New York

Of Counsel

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REPLY BRIEF

1. The City has argued that the Court applied a rule that the invalidity of an injunction may not be litigated in defense of a criminal contempt charge to the area of free speech in *Howat* v. *Kansas,* 258 U.S. 181. While we doubt that this is a proper reading of *Howat, supra,*[1] the simplest answer to the City's claim is that *Howat* was decided at a time when the protections of the First Amendment were deemed inapplicable to the States. In *Prudential*

[1] The opinion of the Court in *Howat* v. *Kansas,* 258 U.S. 181, makes no reference to any defense grounded on freedom of speech. The defendants in *Howat* attacked their convictions on the ground of the federal unconstitutionality of a Kansas "compulsory arbitration law." The state courts sustained the injunctive power of the court on grounds independent of that statute. Inasmuch as the state court "did not depend on the constitutionality of that act for its jurisdiction or the justification of its order" (258 U.S. at 190), the Court concluded that the case was decided "in the state courts on principles of general, and not Federal, law. . . ." (*ibid.*).

Ins. Co. v. *Cheek*, 259 U.S. 530, 543, the Court said that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the State any restriction about 'freedom of speech' . . . ." Not until *Gitlow* v. *New York*, 268 U.S. 652, 666, did a majority of the Court "assume" that the due process clause of the Fourteenth Amendment protected free speech against infringement by the States. Only subsequent to *Gitlow*, *supra*, were there holdings that the First Amendment protections applied against the States.[2]

2. The Brief for Respondent (pp. 48-62) also argues that the contempt convictions should be sustained on the basis of conduct other than a violation of Birmingham City Code Section 1159, the law forbidding parades, processions, or demonstrations without a permit. The City claims that the conviction can be sustained on a conspiracy charge, on charges of congregating in mobs and of conduct calculated to cause breaches of the peace, and for violation of a battery of statutes and ordinances relating to pedestrian traffic.

It is sufficient answer that none of these charges were relied upon, or even mentioned by either of the courts below.[3] Both courts below relied on the theory that peti-

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[2] See, e.g., *Fiske* v. *Kansas*, 274 U.S. 380; *Stromberg* v. *California*, 283 U.S. 359, 368; *Dejonge* v. *Oregon*, 299 U.S. 353, 364.

[3] The City seeks support for its conspiracy theory in a statement by the trial court that petitioners made "concerted efforts" to violate the injunction. (Brief of Respondent, p. 19, note 9.) The quoted language does not support the City's assertion that the court found a conspiracy. Indeed, neither court below even used the word "conspiracy."

Nothing in either opinion below supports the notion that petitioners were convicted for violation of provisions enjoining congregating in mobs or conduct calculated to cause a breach of the peace. The trial court did not state that petitioners were charged with any such violations; it mentioned only the charges that they issued a press release containing deroga-

tioners violated the injunction's prohibition against parades without permits (R. 420, 437-438). It would be impermissible for this Court to affirm the petitioners' contempt convictions on a ground on which the courts below did not choose to put the convictions and did not make any findings. *Garner* v. *Louisiana*, 368 U.S. 157, 164. And, if the Supreme Court of Alabama had relied on the various grounds now relied on by respondent, it would have violated the principle of *Cole* v. *Arkansas*, 333 U.S. 196, by affirming a criminal conviction on appeal on the basis of charges never litigated at trial. See also, *Shuttlesworth* v. *Birmingham*, 376 U.S. 339 (per curiam). Furthermore, respondent's claim merely reinforces petitioners' objection that the injunction was vague and overbroad. We point out one example. If, as the City now claims for the first time, petitioners were convicted for violating Birmingham City Code sections 1142 or 1231 (Brief of Respondent, pp. 49, 79-80), the convictions obviously would be invalid under *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, a case involving the very same two laws. Moreover, notwithstanding the City's rhetoric in referring to mobs, riots, violence and disorder, there is simply no evidence that petitioners engaged in any such conduct. We submit that the description of the events of April 12 and April 14, 1963 in Peti-

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tory statements about Alabama courts and the injunctive order and that they participated in parades without a permit (R. 420). The Alabama Supreme Court found a violation of the order on the basis of parades without a permit (R. 437-438), relying on a supposed concession in petitioner's brief in that court (*ibid.*).

The claim that petitioners' convictions may be sustained on the theory that they violated a host of laws regulating pedestrian traffic and other matters (Brief of Respondent, pp. 49, 77-83) is insupportable. None of these laws was ever mentioned in this litigation before the City's brief in this Court. It is absurd for the City to contend at this late date that petitioners were convicted for jaywalking, failing to keep to the right side of crosswalk, loitering or some similar violation, when no such claim was ever made or considered in any court below.

tioners' Brief, pp. 16-22, fairly and completely describes the record.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN C. AMAKER
LEROY D. CLARK
CHARLES STEPHEN RALSTON
MICHAEL HENRY
10 Columbus Circle
New York, New York 10019

ARTHUR D. SHORES
1527 Fifth Avenue North
Birmingham, Alabama

ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue North
Birmingham, Alabama

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